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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-205

JON RANDOLPH FLOYD, *et al.*,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

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No. .....

JON RANDOLPH FLOYD, *et al.*,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered on April 13, 1973, affirming petitioners' conviction in the United States District Court for the Western District of Oklahoma for violating Title 18, U.S.C. §1382.

Opinions Below

The opinion of the United States Court of Appeals affirming the judgment of the District Court is reported at 477 F.2d 217 (10th Cir. 1973). It is set out in the Appendix, *infra*, pp. 1a-12a. The order of the United States Court of Appeals denying the petition for a rehearing *en banc* is set out in the Appendix, *infra*, p. 13a. The opinions of the District Court are reported at 345 F. Supp. 283 (D. Okla. 1972) and set out in the Appendix, *infra*, pp. 15a-34a.

Jurisdiction

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on April 13, 1973, and a timely petition for rehearing *en banc* was denied on May 3, 1973. By order dated June 30, 1973, Mr. Justice White extended the time to file this petition to and including July 30, 1973. This Court has jurisdiction under 28 U.S.C. §1254(1).

Questions Presented

1. Whether a conviction for entering a military base under 18 U.S.C. section 1382 can be sustained in the absence of proof of a specific intent to enter in violation of a lawful base regulation.

2. Whether persons charged with a petty offense under federal law are entitled to a trial by jury when Congress has not specifically provided otherwise.

Statutes and Regulations Involved

18 U.S.C. §1382 provides as follows:

> Whoever, within the jurisdiction of the United States goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or
>
> Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not

to reenter by any officer or person in command or charge thereof—

Shall be fined not more than $500.00 or imprisoned not more than six months, or both.

18 U.S.C. §3401(b) provides as follows:

Any person charged with a minor offense may elect, however, to be tried before a judge of the district court for the district in which the offense was committed. The magistrate shall carefully explain to the defendant that he has a right to trial before a judge of the district court and that he may have a right to trial by jury before such judge and shall not proceed to try the case unless the defendant, after such explanation, signs a written consent to be tried before the magistrate that specifically waives both a trial before a judge of the district court and any right to trial by jury that he may have.

18 U.S.C. §3401(f) provides as follows:

As used in this section, the term "minor offenses" means misdemeanors punishable under the laws of the United States, the penalty for which does not exceed imprisonment for a period of one year, or a fine of not more than $1,000, or both . . . .

Rule 3 of the Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates provides as follows:

(a) Complaint or Citation. The trial of a petty offense may proceed on an information filed with the clerk of

the district court or on a complaint, citation, or violation notice filed with the magistrate.

(b) Consent; Arraignment. The magistrate shall state to the defendant the charge against him and shall inform the defendant of his right to counsel and to a trial in the district court. If the defendant signs a written consent to be tried before the magistrate which specifically waives trial before a judge of the district court, the magistrate shall take the defendant's plea to the charge. The defendant may plead not guilty, guilty or, with the consent of the magistrate, nolo contendere. If the defendant pleads not guilty the magistrate shall either conduct the trial immediately or fix a time for the trial, giving due regard to the needs of the parties to consult with counsel and to prepare for the trial.

(c) Trial

(1) Procedure. The trial shall be conducted as are trials of petty offenses in the district court by a district judge without a jury.

(2) Record. Unless the Defendant waives in writing keeping of a verbatim record, proceedings under this rule shall be taken down by a reporter or recorded by suitable sound recording equipment.

Oklahoma City Air Materiel Area Tinker Air Force Base (Air Force Regulation) 125-37, Supplement 2 provides in pertinent part as follows:

6b.1 Entry Control Procedures for Tinker Air Force Base:

a. This supplement applies to members of the general public as well as Air Force personnel. *Personnel*

with identification other than those identified in b, c and d below are prohibited from entering into Tinker Air Force Base.

b. The following personnel identification will be recognized at all perimeter gates for base admittance:

(1) AFLC Form 80, "Interim Identification."

(2) AFLC Form 80F, "Temporary Credential."

(3) AFLC Form 80M, "Identification Credential."

(4) DD Form 2 series: 2AF—Air Force; 2A—Army; 2N—Navy; 2MC—Marine Corps; and 2CG—Coast Guard.

(5) DD Form 1173, "Uniformed Services Identification and Privilege Card."

(6) PHS 1866-1, 2 and 3, "US Public Health Service."

(7) General Accounting Office Credentials.

(8) Federal Bureau of Investigation Credentials.

(9) Civil Service Commission Credentials.

c. Subject to the security requirements as determined by the installation commander, the following personal identification may be recognized at Gates 1 and 2 for base admittance:

(1) CAP Forms 14 and 16, "Civil Air Patrol."

(2) Boy Scout Registration Card of Pack 116, Post 116, Troop 67.

(3) Membership card of auxiliary or associate members of the Tinker AFB Officers' and NCO Open Messes.

(4) Membership cards of Tinker AFB Rod and Gun Club.

d. Subject to security requirements as determined by the installation commander, *personnel with identification other than those described in 6b and c above may be authorized admittance to Tinker Air Force Base under the following procedures*:

(1) Visitors desiring admittance to Tinker Air Force Base must state the nature of their visit and the person or activity to be visited, to Security Police Division personnel.

(a) Statements submitted in accordance with 6b. 1d(1) above will be verified by Security Police personnel prior to the issuance of identification of an admittance to base.

(b) Monitors for major staff offices, OCAMA, and tenant organizations are authorized to verify visitor's admittance statements to Security Police Division. Military personnel may verify individual guests as authorized by 6b.1(d)(2) below.

(c) Upon verification visitors will be issued proper identification.

(d) Visitors must retain issued identification on their persons at all times until exiting base.

(2) Military personnel are authorized guests in the housing area or for social functions at designated areas. Guests must be in the physical presence of the military member or one of his dependents at all times when outside the housing area or area designated for social functions.

(3) Civilian members of the Officers' and NCO Open Messes otherwise qualified for admittance in their own right may bring guests to social functions at the Messes.

(4) Law enforcement officers and firemen in uniform, on official business, will be permitted entry without the issuance of identification.

(5) Personnel escorted under the procedures of OCAMAR-TAFBR 190-3 will not require issuance of individual identification.

Statement of the Case

The petitioners, eight men and four women, were convicted under Title 18, United States Code, section 1382 on a charge of ". . . knowingly, willfully, and unlawfully enter[ing a] military reservation *for the purpose of violating a lawful regulation* prohibiting the entry upon or into said . . . reservation without the consent or permission of the Commanding Officer . . . ." [emphasis supplied].

Prior to their trial, in a consolidated motion to dismiss the information, petitioners challenged their prosecution on the grounds that the Tinker Air Force Base regulation they were alleged to have violated had been improperly promulgated and was, therefore, invalid; that the regulation did not prohibit what the information alleged, but merely established an identification procedure for visitors desiring to enter the base; and that, in any event, the government's reliance on the regulation as a basis for criminal prosecution was constitutionally impermissible on due process grounds. Both this motion and petitioners' consoli-

dated request for a jury trial were denied by the District Court with opinions which are set out in the Appendix, *infra*, pp. 15a-34a.

The events which led to petitioners' convictions were as follows. On May 3, 1972 the Commander of Tinker Air Force Base ordered that an identification system be put into effect at all gates of entry into the base, prohibiting persons without authorized identification from entering the base [R. 42-43]. Prior to May 3, 1972 only certain areas of the base were designated as "Controlled Areas" [AFR 125-37 TAFB Supp. 1] and the Commander was authorized only to remove but not to arrest civilian persons who violated a base regulation, and to forbid them from re-entering the base [R. 45-46, 54].

On May 4, 1972, less than twenty-four hours after the Commander's promulgation of the order requiring identification as a condition of entry onto the base, but before the order was posted, petitioners and others gathered peacefully at the main gate [R. 180]. Several persons, including petitioners, indicated that they wished to meet with the Base Commander to deliver a statement registering their opposition to recent events in the Vietnam War [R. 68, 231]. They were given no notice of the identification system which had gone into effect the day before; they were not asked by the security guards at the base gate to supply any of the authorized forms of identification, including a driver's license [R. 42-43, 124]; and, as the Base Commander himself testified, they could not possibly have known about the regulation which they were subsequently arrested for violating since it was not posted at any of the base gates [R. 47-48, 56, 190, 256].

When petitioners and others had stopped approximately fifty feet inside the base they were told to leave but were still given no notice of the new regulation. When they failed to leave they were arrested, notwithstanding their peaceful conduct which in no way interfered with vehicular or personnel traffic or otherwise interrupted the operation of the base [R. 180].

Nowhere does the trial record contain any evidence that the petitioners intended to violate a lawful Air Force regulation by entering the Base. Nevertheless, they were convicted as charged and sentenced as follows: the four women were given suspended sentences and one year's probation; six of the men were sentenced to four month prison terms; and the other two men were each given maximum sentences of six months in prison and were assessed fines in the amount of $250 and $500 respectively.

REASONS FOR GRANTING THE WRIT

1. The holding of the court below is in direct conflict with the requirement that specific intent to enter a military base in violation of a lawful regulation be proved to sustain a conviction under the first paragraph of 18 U.S.C. section 1382.

When Congress made it a crime to enter a military base "for any purpose prohibited by law or lawful regulation," it implied that both the prohibition and the unlawful purpose must be shown. In *Holdridge* v. *United States,* 282 F.2d 302, 309 (8th Cir. 1960), Judge (now Mr. Justice) Blackmun pointed out that such an interpretation is essential to protect the innocent trespasser from prosecution.

Congress could not have intended that the mere coincidence of entry onto a military reservation and the violation of a base regulation prohibiting speeding or running a stop sign would subject a person to prosecution under the statute. It is well settled that unauthorized entry onto a military reservation is not, per se, blameworthy, *Flower* v. *United States*, 407 U.S. 197 (1972); *Spock* v. *David*, 41 L.W. 2242 (3rd Cir., 1972); *United States* v. *Bishop*, 261 F. Supp. 969 (N.D. Cal. 1966). It becomes so, within the meaning of paragraph one of section 1382, only when accompanied by a specific intent to violate a lawful regulation. Cf. *United States* v. *Freed*, 401 U.S. 601 (1970).

Mr. Justice Blackmun's construction of section 1382 for the Eighth Circuit is in direct conflict with the holding of the Tenth Circuit in its decision below. In *Holdridge*, the court pointed out:

> [I]t seems clear enough, from the use of the words "for any purpose prohibited" in the first paragraph of the section, that motive is, to some extent at least, an element of the offense there defined. Purpose and the prohibition must both be proved. This interpretation affords some protection to the innocent trespasser.

This construction is essential to sustain the constitutionality of the first paragraph of section 1382, but it was not applied by the court below. This Court has long established that a statute setting forth criminal penalties for the violation of a separate regulatory scheme cannot be used as the basis for a prosecution unless the defendant had a specific intent to violate the regulatory scheme. *Lambert* v. *California*, 355 U.S. 225 (1957); accord *Smith* v. *California*, 361 U.S. 147 (1959). In *Lambert*, the petitioner's failure to

register with municipal authorities as a convicted felon was held to constitute an omission which could not be elevated to a criminal offense without proof that the petitioner had *actual notice* of the registration requirement and therefore specifically intended to violate it. In the instant case the record is utterly devoid of proof that petitioners had notice of the identification requirement they were charged with violating when they entered the base. Indeed, several of the government's witnesses testified that petitioners could not possibly have known about the regulation containing the requirement because it was not posted at the gate where they entered. "Where a person did not know of the duty . . . and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process." *Lambert* v. *California,* 355 U.S. at 229.

The holding of the court in *Holdridge* that the second paragraph of section 1382[1] does not require proof of specific intent is entirely consistent with this construction of the first paragraph of the section. In explaining the difference between the two sections Mr. Justice Blackmun pointed out that:

> This second paragraph is directed to re-entry after removal or after appropriate order not to re-enter. This paragraph thus involves a second invasion of the premises and one where the accused, because of his

[1] The second paragraph provides as follows:

Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof—shall be fined not more than $500 or imprisoned not more than six months, or both.

prior removal or the formal order, *is definitely aware that re-entry is prohibited.* [Emphasis supplied in part.] 282 F.2d at 308-09.

Other courts which have construed paragraph two of the statute have adhered strictly to the requirement that personal notification not to re-enter a base, or actual physical removal therefrom, be shown to sustain the conviction. See, e.g., *United States* v. *Seijo,* 281 F. Supp. 708, 710 (D. P.R. 1968); cf. *Weissman* v. *United States,* 387 F.2d 271 (10th Cir. 1967).

The specific knowledge or notice requirement implicit in the first paragraph of section 1382 is absolutely necessary to satisfy due process. "Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community." *Lambert* v. *California,* 355 U.S. at 229. The holding of the court below is in direct conflict with this well established principle.

2. There is no evidence that petitioners intended to violate a lawful regulation when they entered Tinker Air Force Base, but rather they intended to exercise their First Amendment rights.

Cross-examination of the government's witnesses at trial revealed not only that the petitioners could not possibly have known about the regulation they were charged with intending to violate, but also that they had gathered peacefully to protest the Vietnam War and seek an audience with the Commanding Officer and that generally their activity did not disrupt the base [Tr. 179-80, 195, 231]. Furthermore, the general public was permitted to enter the base both before and after the regulation in question was promulgated

one day prior to petitioners' arrest, and the forms of identification sufficient to authorize entry under the new regulation included those as universal as a driver's license and as indiscriminate as a Boy Scout registration card [Tr. 42-43].[2] Petitioners were not told that they could not enter the base without the requisite identification, but were warned simply that their entry would result in their arrest.

This Court recently held that a conviction under the second paragraph of section 1382 could not be sustained where the defendant had sought to exercise his First Amendment rights on a military base generally accessible to the public, even though a base regulation prohibited such activity and he had previously been barred from the base for violating the regulation. *Flower* v. *United States,* 407 U.S. 197 (1972) (per curiam). For the same reason a base may not be "selectively closed" to civilians who intend to engage in peaceful political activities such as leafleting or campaigning for public office, *Spock* v. *David,* 41 LW 2242 (3rd Cir., 1972), nor may the commander of a "closed base" grant access to some members of the public but deny it to others because he disagrees with their views. *Jenness* v. *Forbes,* 41 LW 2270 (D.R.I., 1972).

Where the purpose of entering even a *restricted* military base touches the First Amendment, therefore, the prohibition must be construed narrowly to ensure that it is not discriminatorily applied and that it is invoked only to prevent "imminent lawless conduct," *Kiiskila* v. *Nichols,* 433

[2] Two Tinker Air Force Base regulations promulgated prior to May 3, 1972 established certain "controlled access" areas within the Base, but did not control access to the entire Base. Exhibits E and F to Supplemental Memorandum in Support of Defendants' Motion to Dismiss Information.

F.2d 745, 751 (7th Cir. 1970) or conduct intended to "promote disruption." *United States* v. *Bradley*, 418 F.2d 688, 691 (4th Cir. 1969).

In the instant case the record is devoid of evidence that petitioners' conduct either had or was intended to have such an effect. On the other hand, there is ample evidence that petitioners were engaged in protected First Amendment activity which they had no reason to believe ran afoul of any lawful base regulation at the time they entered the base. This Court should therefore grant certiorari to review the broad construction given by the court below to the prohibition in section 1382, in direct conflict with the decisions of this Court and other federal courts regarding the prohibition of First Amendment activity by civilians on military bases.

3. Since petitioners were charged with a petty offense and elected to be tried before a district judge, they were entitled to a trial by jury as guaranteed by the Sixth Amendment to the Constitution since this right has not been specifically taken away by Congress.

18 U.S.C. §1382 provides that any person who goes upon a military reservation for any purpose prohibited by law or any lawful regulation shall be fined not more than $500.00 or imprisoned not more than six months or both. The penalty clearly puts the offense into the "petty offense" category of 18 U.S.C. §1(3). This offense also falls within the "minor offense" category of 18 U.S.C. §3401 (f).

The question here is whether a person who elects to be tried before a district judge under the provisions of 18

U.S.C. §3401 (b) is entitled to a jury trial even if he is charged with a petty offense. Section 3401 is silent about the right of a person charged with a petty offense to a trial by jury if he elects to be tried before a district judge. That section provides only that the Supreme Court shall prescribe rules of procedure and practice for the trial of cases before magistrates and makes no mention of any authority given to the Supreme Court to prescribe rules of procedure concerning the trial of petty offenses before district court judges. Congress, however, has not expressly provided that a defendant who has elected to be tried before a district judge is not entitled to a trial by jury. Rule 3 of the Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates, which states that a trial of a petty offense before a district court judge is to be tried without a jury, is therefore beyond the rule making power of the Supreme Court.

The Tenth Circuit held in the decision below that since petitioners were charged with a petty offense they had no right to a jury trial. In *United States* v. *Bishop*, 261 F. Supp. 969 (N.D. Cal. 1966), however, the District Court held that the defendants who were also charged with violating Section 1382, were entitled to a jury trial. The court noted that the federal statutes have no provision concerning whether a trial of a petty offense in the district court upon election of the defendant will be jury or non-jury.

As to those offenses for which a defendant is not guaranteed a trial by jury by the Constitution he is entitled to a jury trial unless Congress has provided to the contrary.

In *Callan* v. *Wilson*, 127 U.S. 540, 555 (1886) the Supreme Court stated that "there is a class of petty or minor offenses not usually embraced in public criminal statutes

and not of the class or grade triable at common law by a jury, and which [may] . . . *under the authority of Congress,* be tried by the court and without a jury . . . " (emphasis added). The District Court in *United States* v. *Bishop,* 261 F. Supp. at 971, after reviewing the English and common law right to a trial by jury, stated that "the right to a criminal jury was a protection generally in existence except where the positive law of Parliament or the colonial legislatures make explicit inroads upon it."

Because of the apparent conflict between the Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates and the Federal Statute on the question, which has no provision concerning whether a trial of a petty offense in the district court upon election of the defendant will be jury or non-jury, the Court should grant the petition for a writ of certiorari to resolve this question.

CONCLUSION

For the foregoing reasons the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

Opinion of the United States Court of Appeals for the Tenth Circuit

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

April 13, 1973

Nos. 72-1741 to 72-1752

Rehearing Denied May 31, 1973

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JON RANDOLPH FLOYD *et al.*,

Defendants-Appellants.

BARRETT, Circuit Judge.

The appellants were convicted of going upon Tinker Air Force Base military reservation for the purpose of violating a lawful regulation prohibiting their entry without the permission of the commanding officer in violation of 18 U.S.C.A. § 1382. Section 1382 carries a fine of not more than $500 or imprisonment of not more than six months or both.

On May 4, 1972 the appellants and 75 to 200 others gathered at Gate Two at Tinker Air Force Base in Oklahoma City, Oklahoma to protest the war in Vietnam. A group of between 30 and 40 people crossed the "white line"

signifying entrance to the base. They were met by Lt. Col. George Malone who read them the following statement:

> The installation commander, Col. John C. Holley, United States Air Force, denies you permission to enter this military installation or to be physically present on its property.
>
> You are trespassing on a military installation of the United States. By order of the installation commander you will immediately remove yourselves from this military installation. If you do not immediately comply, you will be arrested and prosecuted by the federal authorities. You are advised that pursuant to Title 18 USC 1382 "whoever, within the jurisdiction of the United States, goes upon any military, naval, or coast guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation . . . shall be fined not more than $500 or imprisoned not more than six months, or both." (R., Vol. II, p. 212)

The Appellant Flower then read a statement to Col. Malone. The group was asked to leave; instead, they sat down in the middle of the street and refused to leave. They were next placed on a bus and taken to Security Police Headquarters where they were photographed.

Tinker Air Force Base is one of the nation's largest military installations, with thousands of civilian employees. Reports had been received by the Base Commander several days before the gathering that a demonstration against the Vietnam War was going to be held on the base.

Some of the appellants plead guilty; others were tried by the Magistrate. These 12 appellants were tried by the U. S. District Court.

Air Force Regulation 125-37 was promulgated on July 27, 1964 by then Air Force Chief of Staff General Curtis E. LeMay. It established procedures to protect Air Force physical resources. Regulation 125-37 was revised and supplemented several times thereafter. On May 3, 1972 Col. John C. Holly, then Commander of Tinker Air Force Base, supplemented AFR 125-37 by the promulgation of OCAMA-TAFB Supplement 2 which effectively precluded the demonstrators from entrance because they did not qualify as "visitors". See United States v. Vaughan, 475 F.2d 1262 (10th Cir. 1973). The appellants were convicted under § 1382 of violating Supplement 2.[1]

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[1] Supplement 2 reads in part as follows: AFR 125-37, 27 July 1964, is supplemented as follows:

6b.1 ENTRY CONTROL PROCEDURES FOR TINKER AIR BASE:

a. This supplement applies to members of the general public as well as Air Force personnel. Personnel with identification other than those identified in b, c and d below are prohibited from entering into Tinker Air Force Base.

b. The following personnel identification will be recognized at all perimeter gates for base admittance: . . .

c. Subject to the security requirements as determined by the installation commander, the following personal identification may be recognized at Gates 1 and 2 for base admittance: . . .

d. Subject to security requirements as determined by the installation commander, personnel with identification other than those described in 6b and c above may be authorized admittance to Tinker Air Force Base under the following procedures:

(1) Visitors desiring admittance to Tinker Air Force Base must state the nature of their visit and the person or activity to be visited, to Security Police Division personnel.

(a) Statements submitted in accordance with 6b.1d(1) above will be verified by Security Police personnel prior to the issuance of identification or an admittance to base.

(b) Monitors for major staff offices, OCAMA, and tenant organizations are authorized to verify visitor's admittance

The appellants contend that: (1) the trial court erred in denying them a jury trial; (2) Supplement 2 is void and violates the due process clause; (3) the trial court penalized them for standing trial; and (4) the trial court erred in overruling their motion for judgment of acquittal.

I.

The appellants contend that they were entitled to a trial by jury because of the seriousness with which a violation of § 1382 is regarded by the community. The District Court ruled against them in United States v. Floyd, 345 F.Supp. 283 (W.D. Okla. 1972), holding that a violation of § 1382 is a petty offense which does not entitle the defendants to a jury trial, and further that Article III, Section 2, Clause 3 and the Sixth Amendment of the United States Constitution do not extend to petty offenses. A petty offense is defined in 18 U.S.C.A. § 1(3) as: "Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both . . ." If an offense is *malum in se* it may be serious enough to require a jury trial even though it qualifies as a petty offense. District of Columbia v. Colts, 282 U.S. 63, 51 S.Ct. 52, 75 L.Ed. 177 (1930). The offense here is *malum prohibitum*. Congress has not been silent on this subject as the appellants suggest. It has intended that there be no jury trial for a petty offense. 18 U.S.C.A. § 1(3). If the

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statements to Security Police Division. Military personnel may verify individual guests as authorized by 6b.1(d)(2) below.

(c) Upon verification visitors will be issued proper identification.

(OCAMA-TAFB, Supplement 2, AFR 125-37, 3 May 1972)

(continued on following page)

offense is a petty offense within 18 U.S.C.A. § 1(3) and is not otherwise a serious offense under prior U.S. Supreme Court decisions then a jury trial is not required. Cheff v. Schnackenberg, 384 U.S. 373, 86 S.Ct. 1523, 16 L.Ed.2d 629 (1966). The reasoning of the District Court is sound. The evidence supports its holding. See United States v. Floyd, *supra*. The violation of Section 1382 here involved constitutes a petty offense not requiring a trial by jury.

II.

The appellants allege that TAFB-OCAMA Supplement 2 to AFR 125-37 is void because it was never lawfully adopted. They also contend that Supplement 2 violates the due process clause because it established only policies which cannot be criminally violated and that it is void for vagueness because it failed to announce the acts it forbids.

The appellants argue that Supplement 2 is void because it was not promulgated in compliance with the Federal Register Act, 44 U.S.C.A. § 1501 et seq. and the Administrative Procedure Act, 5 U.S.C.A. § 500 et seq.

We hold that there is no merit in this argument. Both are, in effect, "notice" statutes intended to protect persons who have no *actual notice* from in any manner being adversely affected. It is unrealistic to contend that "closed base" commanders charged with the obligation of protecting the national security thereon, cannot adopt regulations effective immediately, even if only orally communicated to the base security personnel, so long as such regulations are thereafter communicated to one who wishes to enter upon the base. Neither the Federal Register Act nor the A.P.A. require publication of Supplement 2 on the facts of this case. In recognition of the needs involving national

security, we recently held that once one is within an area where base security is imposed, a search may be conducted without probable cause, and without consent. United States v. Vaughn, *supra.*

The appellants contend that Supplement 2 is void because it was issued in direct violation of the controlling regulation it supplements, AFR 125-37. Paragraph 2 of AFR 125-37 provides in part as follows:

> Further, the on-base violation of a lawful regulation issued by a base commander may be sufficient to sustain the removal from the base of a person not subject to the UCMJ and to sustain a criminal prosecution of such a person for an unauthorized re-entry of the base under 18 USC 1382 even though the base regulation may not have been issued pursuant to 50 USC 797.
>
> (Para. 2, AFR 125-37, 27 July 1964)

Paragraph 4[2] of 125-37 announces mandatory steps which must be taken for subordinate regulations to have legal ef-

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[2] In general, to have legal effect for various categories of persons, any directive or regulation applying to the protection of USAF physical resources should meet the following requirements:

a. For persons subject to the UCMJ, it must:

(1) Be issued by order of the base commander. At bases utilizing civilian contractor guards, the authority to issue such directives *cannot* be delegated to the civilian contractor.

(2) Clearly describe, identify, and locate the property or area.

(3) State that specific permission of the commander is required to enter or use the particular area or resource.

(4) Be posted or otherwise displayed to insure that the individual has constructive or actual knowledge of the directive.

fect. The requirements in paragraph 4 generally pertain to prosecutions of offenses arising under 50 U.S.C.A. § 797 and the offense of re-entry after removal under 18 U.S.C.A. § 1382. The appellants were not charged with the crime which the regulation defines. It is within the sole discretion of the commanding officer of a "closed base" to promulgate rational regulations excluding people from the military installation in the interest of the national security. He has practically exclusive and extensive power to exclude persons from the base in the interest of good order and military discipline. Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961); McQueary v. Laird, 449 F.2d 608 (10th Cir. 1971).

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b. For persons not subject to the UCMJ, to sustain removal and order not to re-enter under 18 USC 1382, it must:

(1) Meet the requirements stated in a (1) through (3) above.

(2) Direct removal and forbid re-entry, in the name of the base commander.

c. For all persons within the US, its territories and possessions, it must:

(1) Meet the requirements stated in a (1) through (3) above.

(2) Have been issued by a person designated in DOD Directive 5200.8.

(3) Be posted in a conspicuous and appropriate place. For standardization, the display of such a directive at gates of bases or areas will satisfy this requirement.

(4) Pertain to one of the subjects listed in 50 USC 797.

(5) State that it was issued under the DOD directive and the statute. The notice to the public incident to the issue of the regulation must also contain the same statement.

(6) Cover a physical area that is subject to USAF jurisdiction, administration or custody.

(Para. 4, AFR 125-37, 27 July 1964)

The 4th Circuit recently held in Burnett v. Tolson, 474 F.2d 877 (4th Cir. 1973), that where military reservations are open to the public it is now clear that civilians have an unqualified right to enter these public areas to exercise their constitutional right to freedom of expression. Where the area is open to the public the base commander has no discretion but has a ministerial duty to allow leafletting. However, when the military reservation is a "closed base",[3] the base commander at Tinker had the authority to determine the degree of control over personnel entering or leaving the base. Para. 6b, AFR 125-37, 27 July 1964.

The appellants challenge whether posting a sign outside the confines of Tinker Air Force Base sufficiently conveys actual notice of Supplement 2. The large sign reads as follows:

WARNING

U.S. AIR FORCE BASE

IT IS UNLAWFUL TO ENTER THIS AREA WITHOUT PERMISSION OF THE COMMANDER TINKER AIR FORCE BASE WHILE ON THIS INSTALLATION ALL PERSONNEL AND THE PROPERTY UNDER THEIR CONTROL ARE SUBJECT TO SEARCH

(Sec. 21, Internal Securities Act of 1950: 50 U.S.C. 797)

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[3] *Closed Base.* It will be:

(a) Posted with warning signs at all perimeter gates and along the base perimeter.

(b) Patrolled internally by air police forces in vehicles. Air police forces will be assigned at perimeter gates, when open, to control personnel and vehicle traffic.

(c) Fenced around the perimeter, when practicable.

(Paragraph 6(a)(1), AFR 125-37, 27 July 1964)

To be sure, the sign does not convey actual notice of the entire content of Supplement 2. It was not, however, the only notice that the appellants had that Tinker Air Force Base was a controlled entry installation. They were warned by the sign, the five security guards, and the fence around the installation. In any event there can be no question that the sign and the security guards gave the appellants *actual notice* that they could enter *only* with the permission of the base commander. The record is clear that they were informed of his denial of their right of entrance before they entered the base.

The appellants argue that Supplement 2 violates the due process clause of the Fifth Amendment to the United States Constitution in that it is void for vagueness, and that it establishes guidelines only, thereby lacking the sufficient enjoinder required of prohibitive regulations.

AFR 125-37 grants the base commander the authority to determine the security to be imposed on personnel entering or leaving the base. Paragraph 6b, AFR 125-37, 27 July 1964. Pursuant thereto the Base Commander promulgated Supplement 2 on May 3, 1972. Twenty-five copies of Supplement 2 were sent to the security guards at the gates. The procedures set forth in Supplement 2 prohibit all persons who do not possess proper identification from entering the base. The language is plain. Those who have proper identification may enter the base and those who do not have such identification may not enter the base. Courts do not require the same precision and specificity of standards in military regulations as in criminal statutes. Dash v. Commanding General, Fort Jackson, South Carolina, 307 F. Supp. 849 (D.S.C. 1969), aff'd, 429 F.2d 427 (4th Cir. 1970), cert. denied 401 U.S. 981, 91 S.Ct. 1192, 28 L.Ed.2d 333 (1971). We agree with the District Court which stated:

It is not significant or prejudicial to the Defendants that the Information describes the regulation as one prohibiting the entry upon the military reservation "without the consent or permission of the Commanding Officer," rather than "without proper identification." Such language is merely descriptive of the regulations, which speaks for itself. The important fact is that the regulation prohibited entry to certain persons. It becomes a matter of proof as to whether the Defendants were such persons and intended to enter the base knowing that they were so prohibited. (R., Vol. I, pp. 130, 131)

III.

The appellants allege that the trial court penalized them for exercising their right to stand trial in the District Court. Those who pleaded guilty before the Magistrate were given suspended sentences except for one defendant who received a one-year probation. Those who pleaded not guilty and who were tried by the Magistrate received suspended sentences except for one defendant who received a two-year probation. Of the twelve defendants who were tried in the District Court, the women received probationary terms, while the men received prison terms of from 4 to 6 months plus varying fines.

In United States v. Wiley, 278 F.2d 500 (7th Cir. 1960), the Court held that a person may not be punished because he has, in good faith, exercised his right to stand trial, even though his effort proves unsuccessful, and that it is improper to make his sentence more severe because he has done so. There is no evidence in the record to support the application of this rule to these appellants. We have held

and now hold that when the sentence is within the limit prescribed by the statute, the length of the sentence imposed is within the discretion of the trial court and will not be disturbed by the reviewing court. United States v. Stidham, 459 F.2d 297 (10th Cir. 1972), cert. denied 409 U.S. 868, 93 S.Ct. 168, 34 L.Ed.2d 118 (1972); Andrus v. Turner, 421 F.2d 290 (10th Cir. 1970); Martin v. United States, 364 F.2d 894 (10th Cir. 1966). The sentences imposed on the appellants were within the statutory limits.

IV.

The appellants contend that the trial court erred in overruling their motion for judgment of acquittal because the Government failed to prove each essential element of the crime beyond a reasonable doubt.

On appeal the evidence is considered in the light most favorable to the Government. United States v. Weiss, 431 F.2d 1402 (10th Cir. 1970). Although the Government conceded that the identification procedure in the early part of the trial did not clearly reflect the names of the appellants, the trial court had an opportunity to observe those persons who were identified during the trial. There was no error.

The appellants contend that the motion for a judgment of acquittal should have been granted because the Government presented no evidence of their purpose or intent to enter the Base without permission of the Base Commander. Intent and purpose may be inferred from the facts and circumstances surrounding the case which reasonably tends to demonstrate mental attitude. United States v. Woodring, 464 F.2d 1248 (10th Cir. 1972); Cummings v. United States, 289 F.2d 904 (10th Cir. 1961), cert. denied 368 U.S. 850, 82 S.Ct. 63, 7 L.Ed.2d 48 (1961). The warning sign posted at the entrance to the Base just north of Gate Two was

visible to anyone who walked or drove onto the base. It states that permission to enter is required. The closed Base, evidenced by the guards, the warning sign, and the fence, gave due notice and warning to the demonstrators that they were approaching a military installation involving the national security. Officer Twomey attempted to hold the group back. He told them that they were not allowed on the Base unless they had permission of the Base Commander. Appellant Tom Flowers asked Officer Maddox what would happen if they crossed the "white line". He was told they would be arrested. Upon entering Col. Malone told them to leave. He read them the warning. In lieu of obeying, they sat down and refused to leave. They carried placards protesting the war in Vietnam. Their intent to enter the base without permission and their intent to demonstrate against the Vietnam war on the Base may be reasonably inferred from these facts.

The appellants allege that the Government failed to prove the location and jurisdiction of the Court beyond a reasonable doubt. This contention has no merit. The trial court properly took judicial notice that Tinker Air Force Base is within the Western District of Oklahoma. United States v. Carter, 430 F.2d 1278 (10th Cir. 1970). The trial court did not err in denying their motion for judgment of acquittal.

Affirmed.

Order Denying Petition for Rehearing

MAY TERM—MAY 31, 1973

Before Honorable David T. Lewis, Chief Judge, Honorable Delmas C. Hill, Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, and Honorable William E. Doyle, Circuit Judges.

Nos. 72-1741 thru 72-1752 Inclusive

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JON RANDOLPH FLOYD, TOM FLOWER, HELEN JILL FOLL, WILLIAM ALEXANDER FREEMAN, HOLLIS ANN FULTZ, JEFFREY N. HERREN, JAMES ALAN HINDMAN, DANNY O. NOLAN, MARIA ELIZABETH PASCALE, WILLIAM LEROY PATCHETT, ELLEN LOUISE WOODLEE, and MICHAEL PHILLIP WRIGHT,

Defendants-Appellants,

and

AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Amicus Curiae.

This matter comes on for consideration of the Petition For Rehearing En Banc filed by the Appellants in the captioned companion cases.

Upon consideration whereof, the Petition for Rehearing En Banc is denied.

HOWARD K. PHILLIPS
Clerk

A true copy
Teste

HOWARD K. PHILLIPS
Clerk, U. S. Court of
Appeals, Tenth Circuit

By ANNE CABAT
Deputy Clerk

Order on "Motion and Demand for Jury Trial"

[Filed July 11, 1972]

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

Cr. 72-175

Violation 18 USC § 1382

UNITED STATES OF AMERICA,

Plaintiff,

v.

JON RANDOLPH FLOYD, TOM FLOWER, HELEN JILL FOLL, WILLIAM ALEXANDER FREEMAN, HOLLIS ANN FULTZ, JEFFREY N. HERREN, JAMES ALAN HINDMAN, DANNY O. NOLAN, MARIA ELIZABETH PASCALE, WILLIAM LEROY PATCHETT, ELLEN LOUISE WOODLEE, MICHAEL PHILLIP WRIGHT,

Defendants.

ALL THE DEFENDANTS have joined in a motion and demand for jury trial. All are charged jointly by Information with violation of Title 18 U.S.C. § 1382, in that they did knowingly, wilfully, and unlawfully enter the Tinker Air Force Base, a military reservation, for the purpose of violating a lawful regulation prohibiting the entry upon and into said military reservation without the consent and permission of the commanding officer. The maximum punishment is imprisonment for six months and a fine of $500.

Defendants assert a constitutional right to trial by jury, but that in any event they are entitled to a jury trial because Congress has not expressly provided otherwise. Article III, § 2, Clause 3 of the Constitution of the United States provides that the trial of all crimes, except in cases of impeachment, shall be by jury. Under the sixth amendment, an accused, in all criminal prosecutions, has the right to a speedy and public trial by impartial jury. The constitutional imperative does not, however, extend to that "class or grade of offences called petty offences, which according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose." *Callan* v. *Wilson*, 127 U.S. 540, 557 (1888). As stated in *Duncan* v. *Louisiana*, 391 U.S. 145, 160 (1968):

> "So-called petty offenses were tried without juries both in England and in the Colonies and have always been held to be exempt from the otherwise comprehensive language of the Sixth Amendment's jury trial provisions. There is no substantial evidence that the Framers intended to depart from this established common-law practice, and the possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications."

Counsel suggests there is a split of authority as to whether a jury trial is required for a petty offense. Cases of the United States Supreme Court refute this. "It is old law that the guarantees of jury trial found in Article III and the Sixth Amendment do not apply to petty of-

fenses." *Bloom* v. *Illinois*, 391 U.S. 194, 210 (1968). No decision of our highest court holds otherwise.

The essential injury, then, is not whether the Constitution requires a jury trial for a petty offense, but whether the defendants are charged with a "petty offense." If it is a petty offense, the constitutional right to a jury trial does not exist. If it is not, the court must grant the defendants' request.

Congress has defined a petty offense as follows: "(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense." 18 U.S.C. § 1(3). The present charge is obviously within that definition.

The Supreme Court has, however, utilized other criteria in determining whether a particular offense is "petty" or "serious." In *District of Columbia* v. *Colts*, 282 U.S. 63, 73 (1930), the court said:

> "Whether a given offense is to be classed as a crime, so as to require a jury trial, or as a petty offense, triable summarily without a jury, depends primarily upon the nature of the offense."

In that case, the defendant was convicted of driving recklessly "so as to endanger property and individuals." The relevant statute provided for punishment by not more than a $100 fine or thirty days imprisonment. The court found that the offense was *malum in se*, indictable at common law, and "an act of such obvious depravity that to characterize it as a petty offense would be to shock the general moral sense." The charge in the present case is not *malum in se*, but *malum prohibitum*. It becomes an

offense under 18 U.S.C. § 1382 only because some statute or lawful regulation prohibits entry without permission. *United States* v. *Bishop*, 261 F. Supp. 969 (N.D. Calif. 1966).

At other times, the Supreme Court has looked principally to the length of the maximum possible sentence to determine if a jury trial is required. In *Duncan* v. *Louisiana*, *supra*, at 161, the court held that a crime for which the punishment could be two years could not be labeled a petty offense:

> "In determining whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial, we are counseled by *District of Columbia* v. *Clawans*, *supra*, to refer to objective criteria, chiefly the existing laws and practices in the Nation. In the federal system, petty offenses are defined as those punishable by no more than six months in prison and a $500 fine. In 49 of the 50 States crimes subject to trial without a jury, which occasionally include simple battery, are punishable by no more than one year in jail. Moreover, in the late 18th century in America crimes triable without a jury were for the most part punishable by no more than a six-month prison term, although there appear to have been exceptions to this rule. We need not, however, settle in this case the exact location of the line between petty offenses and serious crimes. It is sufficient for our purposes to hold that a crime punishable by two years in prison is, based on past and contemporary standards in this country, a serious crime and not a petty offense. Consequently, appellant was entitled to a jury trial and it was error to deny it."

In the most recent case treating the right to a jury trial, *Baldwin* v. *New York*, 399 U.S. 66, 73 (1970), the court held that where possible penalty exceeds six months, the defendant cannot be denied a jury trial:

> "One who is threatened with the possibility of imprisonment for six months may find little difference between the potential consequences that face him, and the consequences that faced appellant here. Indeed, the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and may well result in quite serious repercussions affecting his career and his reputation. Where the accused cannot possibly face more than six months' imprisonment, we have held that these disadvantages, onerous though they may be, may be outweighed by the benefits that result from speedy and inexpensive nonjury adjudications."

Here, the defendants cannot possibly receive more than six months imprisonment, and it would appear likewise that the benefits resulting from the expeditious nonjury determination of guilt or innocence outweigh any possible disadvantage to the defendants.

In other cases, the court has ignored the maximum possible sentence and considered the sentence actually imposed. In *Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966), a sentence of six months was imposed in a contempt proceeding. The court viewed the proceedings as equivalent to a procedure to prosecute a petty offense, and therefore, the defendant was properly convicted without a jury. *See also Frank* v. *United States*, 395 U.S. 147 (1969).

By every suggested standard, the charge against the defendants in this case is a petty offense, not triable by jury under the Constitution. The only other court considering this specific statute has reached this same conclusion, *United States* v. *Bishop, supra,* principally relied upon by the defendants.

The conclusion that the offense charged is a petty offense for which no constitutional right to jury trial exists would seem to be dispositive of the defendants' demand, but in *Bishop,* the court proceeded to hold that a defendant is entitled to a jury trial unless Congress has specifically provided to the contrary. *Compare United States* v. *Beard,* 313 F. Supp. 844, (D. Minn. 1970), in which the court concluded that where Congress had not spoken on the subject, the granting of a jury trial rested within the court's discretion. Counsel for the defendants now urges the reasoning of *Bishop* upon this court. We must reject the reasoning and the conclusion. We find no basis for the assumption that Congress has been silent on this issue. By its very definition of "petty offense" in 18 U.S.C. § 1(3), it has manifested an intent that there be no jury trial. Since it was the rule at common law and under the uniform rulings of the Supreme Court that a petty offense was triable without a jury, it would be unrealistic to suppose that Congress was unaware of this most important characteristic of a petty offense in making this classification. The very purpose of classification is to attribute certain characteristics to the class. There is no reason for a subdivision of misdemeanors of minor gravity if such petty offenses are to be treated as are all other misdemeanors. It is significant that the principal cases relied upon by the court in *Bishop,* (*Callan* v. *Wilson, supra,* (1888), *Schick* v. *United States,* 195 U.S. 65

(1904), and *District of Columbia* v. *Colts, supra,* (1930)), were decided prior to the Congressional enactment of the petty offense classification on December 16, 1930.

In *Bishop,* the court looked at 18 U.S.C. § 3401, relating to trial by commissioners, and could discover no intention by Congress that the trial of a petty offense in district court be without a jury. Subsequent, however, to *Bishop,* Congress amended this section to provide the magistrate shall explain to a defendant charged with a minor offense, (a misdemeanor subject to a maximum punishment of one year imprisonment and $1,000 fine), that "he has a right to a trial before a judge of the district court and that he *may* have a right to trial by jury . . . " (Emphasis supplied.) By inference, Congress has recognized there might be minor offenses, i.e. petty offenses, in which there was no right to trial by jury in the district court.

Further, Congress, by limiting the punishment which may be imposed under 18 U.S.C. § 1382 to six months and $500, has included within the definition of the crime itself a judgment about the seriousness of the offense and therefore the right to a jury trial. *Frank* v. *United States, supra.*

There really is no basis to conclude that a right to jury trial exists outside the Constitution and statutes of the United States. The Supreme Court, in determining the right to jury, has indicated that if an offense can be treated as petty in the eyes of 18 U.S.C. § 1(3) and is not otherwise a serious offense under the prior decisions of the court, the denial of a jury trial is proper. *Cheff* v. *Schnackenberg, supra.*

Rule 23(a) of the Federal Rules of Criminal Procedure provides:

"Trial by Jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government."

The Note to subdivision (a) of the Advisory Committee on Rules states:

"1. This rule is a formulation of the constitutional guaranty of trial by jury, Constitution of the United States, Article III, Sec. 2, Par. 3: 'The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury * * *'; Amendment VI: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *.' The right to a jury trial, however, does not apply to petty offenses, District of Columbia v. Clawans, 57 S.Ct. 660, 300 U.S. 617, 81 L.Ed. 843; Schick v. United States, 24 S.Ct. 826, 195 U.S. 65, 49 L.Ed. 99, 1 Ann. Cas. 585; Frankfurter and Corcoran, 39 Harv. L.R. 917."

As the Note indicates, the rule embodies only the constitutional guaranty of a jury trial and contemplates that the district court is not required to grant a jury trial for a petty offense.

At the time *Bishop* was decided, there was in effect "Rules of Procedure for Trials Before Commissioners," adopted January 6, 1941, by the Supreme Court. Rule 2 of these rules provided, among other things, that the trial before the commissioner "shall" be conducted as are trials of criminal cases in the district court by a district judge in a criminal case where a jury is waived," but no reference was made in the rules concerning the trial in the district court.

The court said, at 973, "Significantly, there is no provision concerning whether a trial of a petty offense in the district court upon election of the defendant will be jury or non-jury," and found that there was no indication of an intent on the part of the Supreme Court as expressed in its rules that there should be no trial by jury when the defendant elects to proceed in the district court.

This argument is no longer valid. The Supreme Court, in a major departure from the former rules, has expressed itself on the requirement for a jury trial in the trial of petty offenses in the "Rules of Procedure for the Trial of Minor Offenses before United States Magistrates," promulgated January 27, 1971. Rule 2 provides that the magistrate shall inform a person charged with a minor offense other than a petty offense "that he has a right to a trial before a judge of the district court and *a jury,*" (emphasis supplied), unless he consents to be tried before the magistrate. Before the magistrate can conduct the trial, the defendant must waive in writing "Trial before a Judge of the District Court and *Jury,*" (emphasis supplied).

Rule 3 provides that the magistrate shall inform the defendant accused of a petty offense "of his right to trial in the district court." He must waive only the right to be tried before a judge of the district court before the magistrate may proceed. Rule 3 also specifically states that the trial before the magistrate shall be conducted "as are trials of petty offenses in the district court by a district judge without jury." By the distinction between the minor offenses and petty offenses in the rules, it is evident that the Supreme Court conceived only a right of trial by jury for minor offenses and rejected the proposition that a jury is constitutionally required in the trial of petty offenders.

And recently the Fourth Circuit in *United States* v. *Merrick*, —— F. 2d ——, (Fourth Cir. 5/18/72) held that a federal "petty offender" has no constitutional or statutory right to a jury trial.

Since the court finds no constitutional or statutory basis for a jury trial in this instance, the defendants' demand for a jury will be denied. If it were within the discretion of the court, the result would be the same. Because of the court's interest in the orderly administration of justice and the practical problems confronting the court in a case with multiple defendants, the advantages of an expeditious and relatively inexpensive adjudication by the court outweigh the benefits which might accrue to the defendants from a jury trial.

IT IS SO ORDERED.

Dated this 11 day of July, 1972.

FRED DAUGHERTY
United States District Judge

Order Denying Motion to Dismiss Indictment

[Filed July 11, 1972]

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. 72-175 Criminal

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

JON RANDOLPH FLOYD, TOM FLOWER, HELEN JILL FOLL, WILLIAM ALEXANDER FREEMAN, HOLLIS ANN FULTZ, JEFFREY N. HERREN, JAMES ALAN HINDMAN, DANNY O. NOLAN, MARIA ELIZABETH PASCALE, WILLIAM LEROY PATCHETT, ELLEN LOUISE WOODLEE, MICHAEL PHILLIP WRIGHT,

Defendants.

ORDER

Defendants move to dismiss the Information filed against them in this case for the various reasons set out below. They are charged with a violation of 18 U.S.C.A. §1382, which reads in pertinent part as follows:

> "Whoever, within the jurisdiction of the United States, goes upon any military . . . reservation . . .

for any purpose prohibited by law or lawful regulation . . . shall be fined not more than $500 or imprisoned not more than six months, or both."

The Information charges Defendants under this Statute in the following language:

> "That on or about the 4th day of May, 1972 at Tinker Air Force Base, Oklahoma, on lands acquired for the use of the United States of America, and on lands constituting a military reservation over which the United States has exclusive jurisdiction and in the Western Judicial District of Oklahoma, [the Defendants] . . . did knowingly, willfully and unlawfully enter such military reservation for the purpose of violating a lawful regulation prohibiting the entry upon and into said military reservation without the consent and permission of the Commanding Officer all in violation of Title 18, United States Code, Section 1382."

Defendants' attack on the Information is two-fold. They claim that the statute and regulations are unconstitutional and that the Information fails to state an offense. The Constitutional claims are that:

1. The Statute is an invalid restraint of rights guaranteed by the First Amendment.

2. The Statute denies equal protection under the Fifth Amendment.

3. The Statute is an unlawful delegation of legislative authority in violation of the doctrine of separation of powers.

4. The Statute and regulations are vague and ambiguous within the meaning of the due process provision of the Fifth Amendment.

5. The regulations fail to adequately notify what is the forbidden conduct in violation of the Sixth Amendment.

6. The punishment provided by the regulations is disproportionate to the offense and constitutes cruel and unusual punishment in violation of the Eighth Amendment. Defendants' nonconstitutional claims are that:

(1) The regulations do not prohibit entry on a military base.

(2) The regulations merely establish conditions of entry.

(3) The regulations are void because they were not published in accordance with law.

Defendants' claims will be considered in the order set out above.

The Statute and regulations are not an unconstitutional abridgement of the Defendants' First Amendment rights. *Weissman* v. *United States,* 387 F. 2d 271 (Tenth Cir. 1967). Defendants did not see fit to brief this question and it does not merit further discussion.

In like manner, Defendants fail to brief the equal protection argument. The guarantee of equal protection is found primarily in the Fourteenth Amendment, which applies exclusively to State action. However, the Supreme Court has recognized that equal protection principles are contained in the Fifth Amendment guarantee of due process. *Bolling* v. *Sharpe,* 347 U.S. 497, 98 L.Ed. 884, 74 S.Ct. 693 (1954). In *Bolling,* however, the Supreme Court noted that due process and equal protection are not interchange-

able terms and the discrimination alleged must be so unjustified as to amount to a deprivation of due process. See also *Schneider* v. *Rusk*, 377 U.S. 163, 12 L.Ed. 2d 218, 84 S.Ct. 1187 (1964). Defendants' claim of discrimination seems to be based on the premise that the regulations involved here give commanders of military installations power to exclude persons therefrom whose views are not the same as their own. No claim is made that this was the case here. It is beyond rational doubt that military commanders have the power to exclude any person from their area of command and that their reasons for so doing are conclusive. *Weissman* v. *United States, supra*. The power lawfully exists; the reasons for its exercise in this case are not in issue on this Motion.

Defendants' next unbriefed contention is that the Statute unlawfully delegates the legislative function. This argument appears to be based on the supposition that the power to exclude any person from a military base permits a base commander to establish public policy, presumably by confining exclusions to persons possessing particular views. The whole argument is specious and falls of its own weight. 18 U.S.C.A. §1382 forbids entry on a military base for an unlawful purpose. The power to issue regulations does not derive from the Statute. See *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 6 L.Ed. 2d 1230, 81 S.Ct. 1743 (1961). Again, the power lawfully exists; the reasons for its exercise are not an issue on this Motion.

Defendants' next two constitutional claims will be considered together. The Defendants urge that the regulations are void because they are too vague and ambiguous and because they do not, in fact, prohibit the entry upon Tinker Air Force Base without the consent and permission of the

commanding officer. Under the scheme of these regulations, Tinker Air Force Base has been designated a "closed base." TAFB Supplement 1, 15 September 1967. The following minimum controls are mandatory for a closed base:

"(1) *Closed Base.* It will be:

(a) Posted with warning signs at all perimeter gates and along the base perimeter.

(b) Patrolled internally by air police forces in vehicles. Air police forces will be assigned at perimeter gates, when open, to control personnel and vehicle traffic.

(c) Fenced around the perimeter, when practicable." Para 6a(1), AFR 125-37, 27 July 1964.

The regulation prescribes that warning signs will be at each gate around the perimeter of the closed base as follows:

"WARNING

ENTRY IS PROHIBITED WITHOUT THE PERMISSION OF THE COMMANDER, ... AIR FORCE BASE. PERSONNEL ENTERING THIS AREA AGREE TO A SEARCH OF THEIR PERSON AND/OR VEHICLE IF DIRECTED BY THE ABOVE COMMANDER. (Sec. 21, Internal Security Act of 1950; 50 USC 797)" Para 10 AFR 125-37, 27 July 1964.

The basic regulation provides the base commander will determine the degree of control over personnel entering or leaving the base. Para 6b AFR 125-37, 27 July 1964. Pursuant thereto, the base commander of OCAMA and

Tinker Air Force Base, on May 3, 1972, promulgated OCAMA-TAFB Supplement 2. Para 6b.1(a) thereof provides:

> "Personnel with identification other than those identified in b, c and d below are prohibited from entering into Tinker Air Force Base."

Subparagraphs b and c deal with the admittance of personnel with previously issued credentials. Subparagraph d states:

> "Subject to security requirements as determined by the installation commander, personnel with identification other than those described in 6b and c above *may* be authorized admittance to Tinker Air Force Base under the following procedures:" (Emphasis supplied.)

These procedures to screen visitors may or may not result in the visitor receiving proper identification and being permitted to enter the base. The specific language of this order by the commanders of OCAMA and TAFB prohibits all persons who do not possess proper identification from entering the base. Nothing could be plainer. By this order, the commanders, in quite unequivocal language, have said those who have proper identification have consent to enter the base, and those who do not have such identification do not have consent and are therefore prohibited. It is beside the point to argue that the Defendants might have obtained the necessary identification and thereupon to have been admitted to the base. Such possibility does not render the regulation vague or ambiguous or otherwise destroy the positive prohibition against entry without consent, that is, without proper identification. Courts do not require the

same precision and specificity of standards in military regulations as in a criminal statute. *Dash* v. *Commanding General, Ft. Jackson, South Carolina,* 307 F. Supp. 849 (D.C. S.Car. 1969). It is not significant or prejudicial to the Defendants that the Information describes the regulation as one prohibiting the entry upon the military reservation "without the consent or permission of the Commanding Officer," rather than "without proper identification." Such language is merely descriptive of the regulation, which speaks for itself. The important fact is that the regulation prohibited entry to certain persons. It becomes a matter of proof as to whether the Defendants were such persons and intended to enter the base knowing that they were so prohibited.

Also not briefed is Defendants' contention that the *regulation* provides for a cruel and unusual punishment. The regulations here involved do not provide for any punishment. The Statute provides for punishment. The Defendants are charged with a crime under the Statute. The punishment provided by the Statute is not cruel and unusual. Our Circuit has affirmed the imposition of the maximum sentence under that Statute. *Weissman* v. *United States, supra.*

Defendants' first two nonconstitutional claims have previously been discussed in their constitutional dimension and further discussion here would serve no useful purpose.

Defendants' final nonconstitutional claim is that the regulations issued locally are invalid because they were not published in the Federal Register. Such is said to be the requirement of the Federal Register Act, 44 U.S.C.A. §§ 301 et seq. and the Administrative Procedure Act, 5 U.S.C.A. §§ 501 et seq. Defendants also contend that the

local regulations are void because not promulgated in compliance with AFR 125-37.

It is the Court's opinion and holding that the local regulations, OCAMA-TAFB Supplement 2, AFR 125-37 dated May 3, 1972 is not required to be published in the Federal Register. 44 U.S.C.A., §1505(a) provides in pertinent part as follows:

> "There shall be published in the Federal Register—(1) Presidential proclamations and Executive orders . . . (2) documents or classes of documents that the President may determine from time to time to have general applicability and legal effect; and (3) documents or classes of documents that may be required so to be published by Act of Congress."
>
> "For the purposes of this chapter every document or order which prescribes a penalty has general applicability and legal effect."

Defendants apparently rely on the last quoted paragraph of 44 U.S.C.A. §1505(a), for they cite cases dealing with regulations prescribing a penalty. The regulations here do not prescribe a penalty. It does not otherwise appear that the regulations fall within any of the other classes enumerated by the Statute.

The Administrative Procedure Act likewise contains no requirement of publication of the local regulation in the Federal Register. 5 U.S.C.A. §552(a)(1) provides in pertinent part as follows:

> "Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—(A) descriptions of its central and field

> organization . . . (B) statements of the general course and method by which its functions are channeled and determined . . . (C) rules of procedure . . . (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency
>
> . . .
>
> Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published . . ."

The regulation issued by the local commander which prohibited Defendants from entering the base does not fall within any of the classifications of the Statute. Even if it is within the Statute, the Government is entitled to show that they had actual notice.

Defendants question the legal status of the regulations issued by the Base Commander under the provisions of paragraph 4 of AFR 125-37, contending that it does not meet the requirements there established. In general, those requirements have to do with prosecutions of offenses arising under 50 U.S.C.A. §797 and the offense of reentry after removal under 18 U.S.C.A. §1382. Defendants are not charged with crimes with which the designated parts of these Statutes deal. Under 18 U.S.C.A. §1382, they are charged with entry with intent to violate a regulation, which is the first paragraph of the Statute, and not with reentry after removal, which is the second paragraph of §1382. Thus, whether the challenged regulation might be sufficient

to sustain a prosecution for an offense under 50 U.S.C. §797 or for an offense under the second paragraph of 18 U.S.C.A. §1382, is not here presented. If such regulation can be sustained as authorized on any basis, it is sufficient for the purposes of this offense. Under the explicit authority of AFR 125-37 and in the light of the historically unquestioned power of a commanding officer, in his discretion, to exclude any person from the area of his command under such restrictions as he may prescribe in the interests of security, good order and military discipline, there can remain no serious doubt of the authority to issue the challenged regulation. *Cafeteria & Restaurant Workers' Union, Local 473 AFL-CIO v. McElroy*, 367 U.S. 886 (1960).

Defendants' Motion to Dismiss is overruled.

It is so ordered this 11th day of July, 1972.

FRED DAUGHERTY

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-205

JON RANDOLPH FLOYD, ET. AL.,
Petitioners,

VERSUS

UNITED STATES OF AMERICA,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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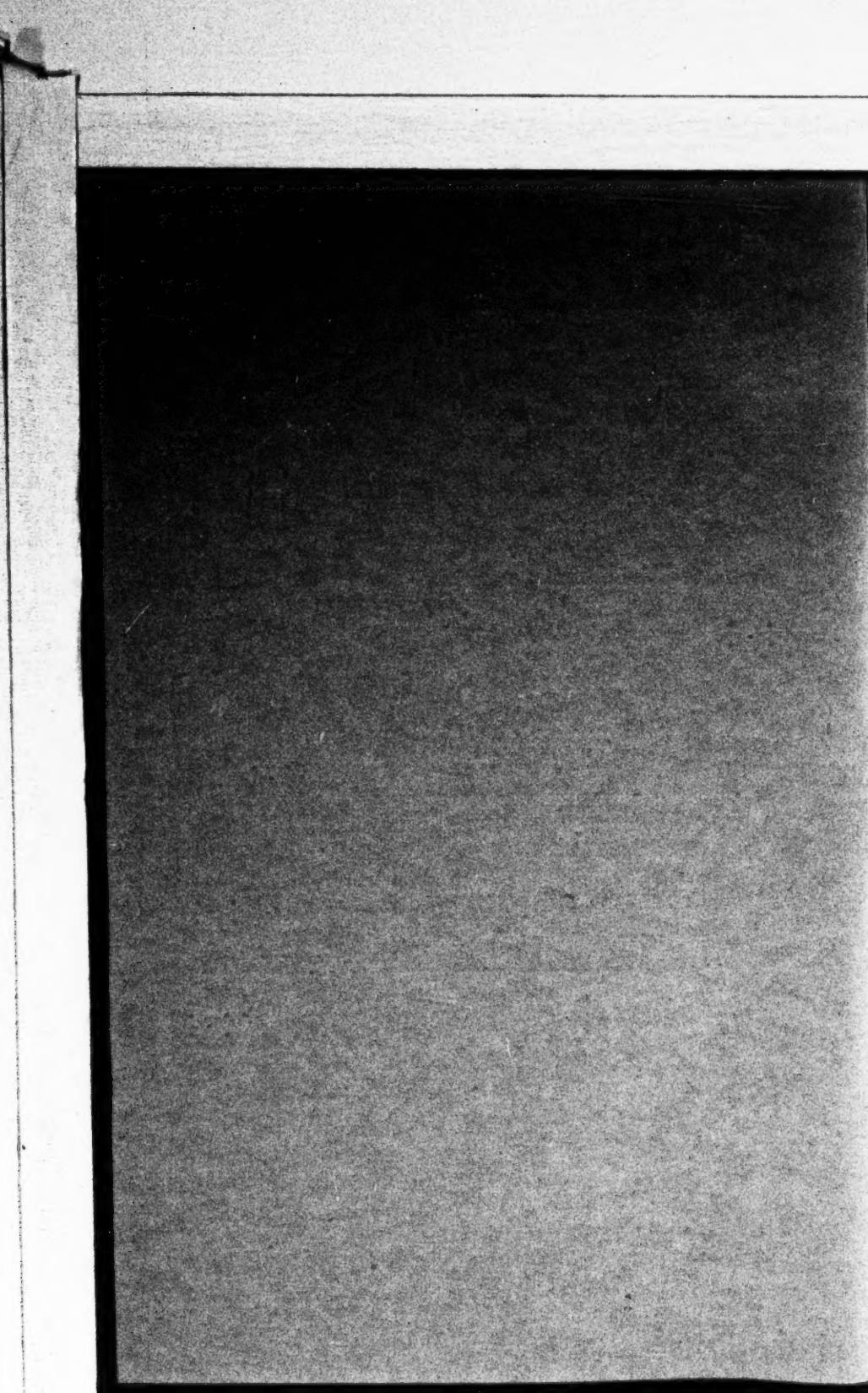


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In the
Supreme Court of the United States
OCTOBER TERM, 1973

No. ————

JON RANDOLPH FLOYD, ET. AL.,
Petitioners,

VERSUS

UNITED STATES OF AMERICA,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON PETITION FOR A WRIT OF CERTIORARI

This motion of the Oklahoma Lawyers Guild for leave to file annexed brief *amicus curiae* is made pursuant to Rule 42.1 of the Rules of this Court. Consent to file such a brief has been granted by petitioners. The Solicitor General has indicated willingness to consent as to issues raised by petition of Petitioners, but has withheld consent as to issues raised by the facts of the case but not raised in petition for certiorari.[1] We pray that the Court permit the entire brief to be filed, as annexed to this motion.

[1] Correspondence between *amicus curiae* and parties to the cases is appended to enclosed motion and annexed brief, on the question of consent to file.

INTEREST OF MOVANT

The National Lawyers Guild, of which movant Oklahoma Lawyers Guild is an active chapter, has forty chapters from coast to coast and several thousand members including attorneys, law students, paralegal workers, and "Jailhouse Lawyers" in Federal and State prisons throughout the nation. Since its organization over three decades ago, it has been active in litigation affecting the rights guaranteed by the Constitution and the Bill of Rights to freedom of expression, due process and equal protection of the law. This activity has included disinterested intervention in pending litigation as *amicus curiae*.

FUNCTION OF THIS BRIEF AMICUS CURIAE

Rule 42 of the rules of this Court provides that this motion must set forth questions of law that have not been, or will not adequately be, presented by the parties, and their relevancy to the disposition of the cases.

Questions presented by petition for writ of certiorari include:

> 1. Whether a conviction for entering a military base under 18 U.S.C. Section 1382 can be sustained in the absence of proof of specific intent to enter in violation of a lawful base regulation.
>
> 2. Whether persons charged with a petty offense under federal law are entitled to a trial by jury when Congress has not specifically provided otherwise.

In conjunction with the argument made on the issue of specific intent, petitioners raised the corollary issue of fact that all evidence indicated that petitioners had the sole

intent of seeking an interview with the base commander in order to exercise their First Amendment rights. No evidence was presented to show that there was a specific intent to violate a lawful regulation or to disrupt the operations of the base.

Arguments of petitioners on these three points were sound and worthy of adoption and implementation by this Court. However, we feel that there are facts in the record not referred to by petitioners which shed light on the process by which the trier of fact reached his verdict against petitioners in spite of all evidence and legal precedent to the contrary which was placed before him. We also wish to argue that the issues are such as warrant summary reversal on the petition for writ of certiorari as in the strikingly similar case of *Flower* v. *United States*, 407 U.S. 197 (1972) (per curiam). As the Solicitor-General has expressed willingness that we intervene as *amicus curiae* on the above issues, we pray that this Court regard this as consent by both parties as to these issues.

We wish to raise two further issues squarely presented by the facts of the case but not raised in petition for writ of certiorari:

1. Whether the sentences imposed on the twelve petitioners disclose arbitrary discrimination by the trial judge on the illicit basis of gender, against males and for females.

2. Whether a comparison of sentences imposed on twelve petitioners to sentences imposed by the Magistrate on twenty persons charged simultaneously under 18 U.S.C. Section 1382, clause one, discloses arbitrary discrimination by the trial judge on the illicit

basis that petitioners chose to stand trial before the judge of the District Court, under 18 U.S.C. Section 3401(b), rather than sign a written consent to be tried before the magistrate.

The Solicitor-General contends that raising issues not raised by petition for certiorari is prohibited by Rule 23(1)(c) of the Rules of this Court. We have consulted with the Clerk of this Court through an assistant, and have been informed that the Solicitor-General has misinterpreted that part of the Rule which states that only issues raised in petition will be reviewed by the Court. Clearly the thrust of the Rule is to prevent discussion of issues not briefed for the Court, not to prevent *amicus curiae* from briefing and arguing additional issues properly under Rule 42.

The language of Rule 42.3 indicates that issues that have not been presented by petition for writ of certiorari may be raised by brief *amicus curiae* if relevant to the disposition of the cases.

These issues are clearly relevant, since if decided in favor of petitioners, the sentences imposed on them would be invalid. We will establish in the annexed brief that the sentences are invalid, that the Court of Appeals below ignored the sex-discrimination issue raised by petitioners, and sanctioned the trial judge's departure from accepted judicial practice as to both issues of discrimination.

These two issues together invoke every governing consideration for granting review listed in Rule 19(b) of the rules of this Court, as annexed brief will also show.

WHEREFORE, it is respectfully prayed that this motion for leave to file the annexed brief *amicus curiae* on peti-

tion for writ of certiorari be granted, partial refusal of the Solicitor-General to consent notwithstanding.

Respectfully submitted,

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September, 1973

In the
Supreme Court of the United States

OCTOBER TERM, 1973

No. ————

JON RANDOLPH FLOYD, ET. AL.,
Petitioners,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF AMICUS CURIAE ON BEHALF OF JON RANDOLPH FLOYD, ET AL., IN FAVOR OF CERTIORARI

QUESTIONS PRESENTED

This series of cases presents questions of law which go to the heart of the constitutional guarantees of right to trial by jury, right to due process and right to equal protection of the laws. These questions are:

1. Whether a conviction for entering a military base under 18 U.S.C. Section 1382, clause one, can be sustained in the absence of proof of specific intent to enter in violation of a lawful base regulation.

2. Whether persons seeking entrance to a military base for the purpose of exercising First Amendment rights may be arbitrarily excluded for that reason,

whereas persons entering for other lawful purposes are freely admitted.

3. Whether persons charged with a petty offense under federal law are entitled to a trial by jury when Congress has not specifically provided otherwise.

4. Whether the sentences imposed on the twelve petitioners disclose arbitrary discrimination by the trial judge on the illicit basis of gender, against males and for females.

5. Whether a comparison of sentences imposed on the twelve petitioners to sentences imposed on twenty others simultaneously charged under the same statute discloses arbitrary discrimination by the trial judge on the illicit basis that petitioners chose to stand trial before the judge of the District Court, under 18 U.S.C. Section 3401(b), rather than sign a written consent to trial before the magistrate; and whether certain remarks of the trial judge at sentencing tends to confirm this.

INTEREST OF AMICUS CURIAE

The interest of *amicus curiae* is set forth in the preceding Motion for Leave to File this brief.

ARGUMENT

1. The trial judge could not reasonably have found the element of specific intent required to be proven to sustain a conviction under the first paragraph of 18 U.S.C. Section 1382.

In the trial of the case, motions to dismiss and to render judgment of acquittal were made by petitioners at appropriate junctures on the ground that the Government failed to establish the *prima facie* element of specific intent.

The purpose here is not to repeat the able presentation of the legal theories involved in the case of *Holdridge* v. *United States*, 282 F.2d 302 (8th Circuit 1960), by petitioners for writ of certiorari. Rather, the purpose is to point out that these theories were brought to the attention of the trial judge, and were slurred over and ignored by him.

The Court of Appeals commented in its opinion that the intent and purpose elements of the offense charged were properly established by circumstantial evidence that petitioners entered the base despite orders to the contrary issued by gate guards, by Colonel Malone, and by warning signs and the existence of a fence.

The intent required to establish the offense charged was to violate a regulation, not to violate an order. There was no evidence of this intent in the record; indeed there was evidence to the contrary. The Court of Appeals misundestood the nature of the intent required.

The trial judge erred even more flagrantly in denying that intent of any kind is an element of the offense. His denial seems to have been based on analogy with the facts of the *Holdridge* case, which involved *clause 2* of Section 1382 proscribing *re-entry* after having previously been barred from the base. Mr. Justice (then Judge) Blackmun clearly drew this distinction, as petition for certiorari observes. Yet the trial judge overruled the motion to dismiss, saying, as to the distinction between clauses one and two:

> "Well, but they qualified their language to some extent and then later I think took that away. I'm well aware of the holding there *and the question is not free of doubt,* but I'm going to overrule your motion" (R. 22, 23). (Emphasis supplied.)

And on the motion for judgment of acquittal, the trial judge added:

> ". . . the Holdridge case that we all are apparently relying on and, apparently, all maybe draw some different interpretation of what the holding was, but there the trial court refused to permit evidence from the defendants as to why they entered or sought to reenter Mead Ordnance Depot at Mead, Nebraska, and the Circuit Court upheld that, said the intent with which they entered was not a necessary element of the offense—. . . and affirmed the conviction. We are all very well aware that's the holding. . . . The motions, the sundry motions, are overruled" (R. 279, 280).

This makes it clear that the trial judge sought to rely on the *Holdridge* case, that he erroneously applied the rationale of its holding to the facts of the instant cases and ignored the qualifying dictum of Mr. Justice Blackmun with regard to clause one. The Court of Appeals sanctioned this error by adding that all the intent required was that petitioners enter the base against orders, whereas intent to violate the regulation establishing an identification procedure was necessary. As the record shows, this latter regulation was promulgated the day prior to the allegedly criminal acts of petitioners, and the guard admitted (R. 111) that, contrary to normal procedure, he did not advise petitioners of the existence of this regulation.

If the Tenth Circuit meant to repudiate the *Holdridge* case, or if it did so inadvertently, the result is the same: a conflict with an important dictum of the *Holdridge* case which calls for clarification and resolution by this Court.

2. Evidence shows no intent to violate any lawful regulation in petitioners, but affirmatively shows an intent to exercise First Amendment rights which military authorities violated.

The trial judge expressed the belief that petitioners had whatever intent was required by the statute. In fact, the evidence is clear that petitioners entered in order to seek an audience with the base commander to convey to him their anti-war views. This is activity protected by the First Amendment right of assembly to convey views in a peaceable manner, and petitioners had no reason, as the evidence shows, to believe they were acting in violation of any regulation.

At this juncture the Court should direct its attention to the testimony of the gate guard, Mr. Alt, at page 111 of the Record. He testified that he departed from normal procedure in failing to advise petitioners and others of the existence of a prescribed identification process by which members of the public might enter the base. It is apparent, since the purpose of petitioners in seeking admittance was a valid one that would normally be granted, that petitioners were barred from the base and arrested for arbitrary and illicit reasons.

Flower v. *United States,* 407 U.S. 197 (1972) (per curiam), overturned petitioners conviction under *clause two* of this statute where such discrimination occurred, summarily on certiorari. The three dissenting justices would have granted certiorari to hear the case on the merits. The facts here are even stronger than *Flower,* because a greater degree of specific intent is required of

clause one offenses. Therefore this Court should grant certiorari on this issue in order to insure that the arbitrary attempts of government employees to suppress dissent on military reservations be curtailed and discouraged. The hasty promulgation of the regulation alleged to have been willfully violated, the neglect of the officers and enlisted men to inform petitioners of the existence of the regulation, and the fact of arrest in spite of the peaceful behavior suggest a conspiracy to violate the constitutional rights of petitioners which their conviction makes a success.

3. The Sixth Amendment right to trial by jury is a necessary safeguard in all criminal cases and should not be dissolved in any case unless authorized by Congress, even if the Court has the rulemaking power to do so.

Petitioners convincingly argue that Rule 3 of the Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates is beyond the rulemaking power of the Court in its statement that trial of petty offenses by a district judge is to be without a jury. Jury trial is a right not to be denied in any case without Congressional authority, and no such authority exists as to 18 U.S.C. Section 1382 in 18 U.S.C. Section 3401(b).

The remarks of the trial judge (Tr. 319, 320) at sentencing highlight a deep jurisprudential reason for hesitation before dissolving the right to jury trial. The framers of the Constitution, mindful of the inevitable impact of crime on the emotions of the trier of fact, sought to bifurcate the responsibility for two reasons: 1) in order that the deliberative process should be so dispersed that no individual's impulses might wrongly deprive defendants of

their rights to cold and impartial verdicts; and 2) in order that representatives of *society* judge crimes against society rather than representatives of the *law*. The criminal law most especially embodies the interests and concerns of society not only in protecting itself against crime but in protecting its members against arbitrary deprivation of physical freedom. The inalienable right to a trial by jury of one's peers guarantees that the letter of the law will always be infused and modified with the common senses and mores of society.

Very wisely, then, this Court has indicated that cases of petty offenses may be tried without jury only under authority of Congress, the *Representative* organ of the Government. *Callan* v. *Wilson*, 127 U.S. 540 (1886).

The right of Trial by Jury comes from the People, and only the Representatives of the People may remove it. Their interests, including caution in removing fundamental rights in certain cases, preclude the making of rules by this Court which would remove these social rights for Legal reasons. This Court must not usurp the province of the Legislature in this regard; even if it decides that it has the *power* to do so, it should not decide that it has the *authority*.

The remarks of the trial judge referred to above personify the abstract danger foreseen by the Framers:

> "I do not consider any of you as martyrs, I consider all of you as violators and maybe it's not true with regard to all the defendants but it is true with some, that it seems to me, that your aims are misdirected. It seems that you're all sail and no anchor. You want to

tear down but you have no constructive suggestions as to what ought to be done to replace what you are attempting to tear down" (Tr. 319-320).

We think this is evidence that the trial judge allowed his own feelings regarding the views of defendants to obscure his impartial analysis of the evidence, especially with regard to specific intent. This is a cogent mandate for the repeal of Rule 3 except as provided by Congress, whether the Court finds the rule beyond its rulemaking power or not.

4. The trial judge imposed sentences on eight male petitioners which penalized them on the illicit basis of gender in violation of their rights to due process and equal protecton of the laws under the Fifth Amendment.

The Court of Appeals failed to comment at all upon the proposition that the sentences imposed by the trial judge on male petitioners penalized them because of their gender. No female petitioner (there are four), nor any person tried by Magistrate, received an outright sentence of incarceration. All eight male petitioners received sentences of from four months to the statutory maximum of six months.

The trial judge consciously must have intended to penalize the eight male petitioners because of their gender: he must have intended the actual, natural, and probable result of his act. He neither defended nor explained his rationale, but simply remarked that he felt his sentences would serve the "interests of justice." The principles of due process and equal protection of the laws call for correction of the manifestly baseless discrimination involved.

This error and its implicit sanction by the Court of Appeals was a gross departure from the expected and usual course of sentencing proceedings, and it calls for exercise of this Court's power of supervision. But there is a further concern: that the Court of Appeals for the Tenth Circuit, in holding that no sentence within the statutory limits will be invalidated, has in effect said that the principles of equal protection and due process are not relevant to the sentencing process. This is a grievous implication in conflict with the holdings of this Court and other circuits, and is in dire need of correction if citizens of the Tenth Circuit are to receive equal justice under the law.

We feel that the silence of the Court of Appeals on this issue, coupled with its remarks as to when sentences may be overturned, is implicitly a sanction of the trial judge's patent and arbitrary discrimination on the illicit basis of gender. However, if the Court feels that such is not to be implied, the cases should be remanded with instructions that the Court of Appeals confront the issue directly. Yet we urge that the sentences be reversed with instructions to modify in accordance with applicable constitutional provisions.

5. The trial judge imposed sentences on all twelve petitioners which penalized the exercise of their statutory rights under 18 U.S.C. Section 3401(b) to stand trial before a district judge rather than accept trial by magistrate, in violation of their rights to due process of law.

Amicus curie urges that the Court of Appeals erred in overlooking or ignoring evidence in the Record indicating that the twelve petitioners were penalized for exercise of

the statutory right to stand trial before the district judge rather than waive this right and accept trial by magistrate. The statute is 18 U.S.C. Section 3401(b).

The Court of Appeals cited the case of *United States* v. *Wiley*, 278 F.2d 500 (7th Circuit 1960), for the proposition that a person may not be punished for exercising in good faith his right to stand trial rather than plead guilty. The Court of Appeals continued:

> "There is no evidence in the record to support the application of this rule to these defendants. We have held and now hold that when the sentence is within the limit prescribed by statute, the length of the sentence is within the discretion of the trial court and will not be disturbed. . . ."

If the Court of Appeals meant to distinguish the *Wiley* case in that it involved a plea of not guilty rather than the passive choice to stand trial before the district judge rather than accept trial by magistrate, then this distinction should not alter the result mandated by *Wiley*. Both the choice to make a plea of not guilty and the choice to have one's guilt proven before district judge are choices protected by the law. The choice in petitioners' cases is protected by 18 U.S.C. Section 3401(b).

In fact, petitioners' sentences were uniformly harsher than those of persons who elected to take trial by magistrate. If the Court meant that no evidence of a disparity exists, then it has ignored the statistics which reveal that the magistrate suspended every sentence imposed on those simultaneously charged with petitioners, excepting William Lemmer, a self-confessed F.B.I. informant, who was not included in the original information.

But the trial judge sentenced all male petitioners to incarceration and sentenced female petitioners to one-year probation terms. It is objectively clear that the effect in the thirty-two cases was uniformly to penalize petitioners and favor others who chose to accept trial by magistrate.

There was, however, subjective evidence in support of this objective conclusion based on sentencing statistics. In the transcript of findings and sentencing, at 319-320, the trial judge made the following remarks just prior to imposing sentences:

> "I think someone has lost sight of the fact that we're here in this courtroom trying an offense of a criminal violation of the law against the United States. We're not here to try the propriety of the war in Indochina and we're not here to test the legality of that situation.
>
> "I think, actually, I have little doubt that nearly every defendant here before me has deliberately attempted to use *this form* as a soapbox to get to the public views which you have expressed and made that confrontation out there for that purpose, to get your names in the paper and not from any standpoint of real love for the country that you live." (Emphasis supplied.)

No one will doubt that the cases here present weighty issues, and that it was entirely appropriate that defendants-petitioners should want these issues to receive the full consideration of the district court. Had the petitioners in bad faith chosen the form in order to get on a soapbox, they most certainly would have testified in the trial itself as to their motives. Yet none of the petitioners took the stand. The trial judge chose to believe, however, that petitioners acted in bad faith, and he clearly penalized them for it.

If the Court meant neither to distinguish *Wiley* nor overlooked this evidence, then its holding that a sentence is invalid only if it exceeds statutory limits, and that the judge's discretion is otherwise untrammeled, must be taken as a repudiation of the principle of *Wiley*, which we urge is applicable to pleas of not guilty and choice of form alike.

This would place the Seventh and Tenth Circuits in effective conflict on the question whether a sentence may be disturbed and must be disturbed in certain circumstances other than a deviation from statutory limits. This conflict is dangerous and intolerable, and is a governing consideration for granting review under Rule 19(b) of the Rules of this Court.

Other jurisdictions have favored modification or reversal of sentences in some circumstances. *See United States* v. *Woosley*, decided by the Eighth Circuit Court of Appeals April 26, 1973, and as yet unreported. Therein it was held that a federal court judge "grossly abused his discretion" by imposing the maximum sentence on a Jehovah's Witness minister for refusing to serve in the military. Statistics were cited by the court in the case to the effect that Woosley's sentence and those of others sentenced for the same crime by the trial judge were far harsher than the national average for the year Woosley's case was tried. *See also U. S.* v. *Martel*, 335 F.2d 764 (4th Circuit 1964); *Baker* v. *United States*, 412 F.2d 1069 (5th Circuit 1969); *United States* v. *Russell*, 260 F.Supp. 265 (M.D. Penn. 1966), all brought to the attention of the Court of Appeals on the point of modification of sentencing.

It is clear that at least four other Circuits have taken on the obligation to enforce the right of criminal defendants not to be sentenced arbitrarily without due process and equal protection of the laws. Yet the Tenth Circuit remains devoted to the concept of infinite judicial discretion in conflict with the other circuits. This holding itself, apart from the sanction of the particular discrimination, is reversible error; the Court of Appeals ought to apply *Wiley* and *Woosley* standards.

We urge that the Court of Appeals be ordered to cause the sentences of petitioners to be suspended, summarily.

CONCLUSION

Under Rule 19(b) of the Rules of this Court, the five issues presented and argued above invoke every listed consideration governing grant of review: cases are in conflict, this Court has not decided the federal questions, related federal questions decided by this Court have been departed from, and accepted judicial practice has been deviated from. No case could be more ripe for review.

WHEREFORE, *Amicus Curiae* respectfully urges that review be granted by issuance of Writ of Certiorari to the Tenth Circuit Court of Appeals in petitioners' cases, and that in addition sentence terms of all thirty-three persons involved be called up for comparison.

Respectfully submitted,

JAMES M. SIMONS
502 West 15th Street
Austin, Texas 78701
Counsel of Record

GARY W. DART
730 Asp Avenue, Suite 208
Norman, Oklahoma 73069
Counsel for Amicus Curiae, Oklahoma Lawyers Guild

September, 1973

Counsel wish to express their appreciation to James Drummond, University of Oklahoma law student, for his help in preparing this Motion and Brief.

APPENDIX A

AMERICAN CIVIL LIBERTIES UNION
22 East 40th Street New York, N.Y. 10016 (212) 725-1222

July 6, 1973

Drew Kershen, Esq.
McDonald and Moore
730 Asp, Ste. 208
Norman, Oklahoma 73069

Re: *Jon Randolph Floyd* v. *U. S.*

Dear Mr. Kershen:

On behalf of petitioners in the above entitled case I consent to the filing of an amicus curiae brief by the Oklahoma Lawyers Guild in support of the petition for certiorari as well as on the merits should the Supreme Court grant certiorari.

Sincerely yours,
s/ Melvin L. Wulf
Melvin L. Wulf
Legal Director

June 29, 1973

Solicitor General of the United States
Department of Justice
Washington, D.C. 20025

Dear Sir:

In compliance with Rule 42 of the Supreme Court Rules, this is to request that you grant consent to the filing of an amicus curiae brief by the Oklahoma Lawyers' Guild in the case of United States v. Jon Randolph Floyd, et al., Criminal Case No. 72-175 from the Western District of Oklahoma and the Tenth Circuit Court of Appeals.

[APPENDIX]

This consent is requested both for the petition of certiorari which will be presented to the court by lawyers for the defendants below, and for the case on the merits should certiorari be granted. The amicus brief would be on behalf of the defendants below and petitioners here.

The organization seeking to submit a brief for the court's consideration is the Oklahoma chapter of the National Lawyers' Guild. This group is vitally concerned with issues presented by the rulings of the courts below and by the facts of the cases, which will not be dealt with in the primary brief but which are germane to the Court's understanding of the case and to the Government's understanding also.

Thank you sincerely for your attention to this matter.

Respectfully yours,

t/ Drew Kershen
Oklahoma Lawyers' Guild

[printed seal]

OFFICE OF THE SOLICITOR GENERAL
Washington, D.C. 20530
July 16, 1973

(202) 737-8200
-2211

AIRMAIL

Drew Kershen, Esquire
McDonald and Moore
730 Asp, Suite 208
Norman, Oklahoma 73069

Re: *Jon Randolph Floyd, et al.* v. *United States*

Dear Mr. Kershen:

With reference to your letter of June 29, 1973, requesting the Solicitor General's consent to your filing of an

amicus brief in the above entitled case on behalf of the Oklahoma Lawyers' Guild, the Solicitor General has asked me to inquire more specifically concerning the Guild's interest in the case.

The Department of Justice has not yet received a copy of the Tenth Circuit's opinion in this case or of a petition for certiorari, and your letter of June 29 does not inform us of what the issues are in the case or of what the Guild's interest is. The Solicitor General will be happy to consider your request for his consent as soon as you apprise us of this information so that he will know what he would be consenting to.

Yours sincerely,
s/ Lawrence G. Wallace
Lawrence G. Wallace
Deputy Solicitor General

[printed seal]

OFFICE OF THE SOLICITOR GENERAL
Washington, D.C. 20530
August 3, 1973

AIRMAIL

Drew Kershen, Esquire
McDonald and Moore
730 Asp, Suite 208
Norman, Oklahoma 73069

Re: *Jon Randolph Floyd, et al.* v. *United States*
No. 73-205

Dear Mr. Kershen:

With reference to your request for my consent to your filing of an amicus brief in the above case on behalf of the Oklahoma Lawyers' Guild, Mr. Wallace of my staff has informed me after discussion with you by telephone that it is your intention to devote your brief to a discussion of issues other than those fairly comprised in the questions

[APPENDIX]

presented in the petition for certiorari. It is our view that only the questions set forth in the petition or fairly comprised therein are properly before the Court under Rule 23 (1)(c) of the Court's Rules.

Accordingly, while I would be happy to consent to your filing of an amicus brief on behalf of the Guild for the purpose of commenting on the questions presented in the petition, it would be inappropriate for me to consent to your filing of the amicus brief you have informed us that you wish to file.

Sincerely,

s/ Robert H. Bork
Robert H. Bork
Solicitor General

cc: Hon. Michael Rodak, Jr.
Clerk
Supreme Court of the United States
Washington, D. C. 20543

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-205

JON RANDOLPH FLOYD, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that their conviction under 18 U.S.C. 1382 for unlawfully entering a military base is invalid because they had no specific intent to commit the offense and because they were entitled to a jury trial.[1]

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[1] The Oklahoma Lawyers Guild has filed a "Motion for Leave to File Brief *Amicus Curiae*" and a brief in support thereof, in which it attempts to raise two further issues. Notwithstanding the Guild's contention that the intent of Rule 23(1)(c) of the Rules of this Court "is to prevent discussion of issues not briefed for the Court, not to prevent *amicus curiae* from briefing and arguing additional issues" (*Amicus* motion, p. 4), we submit that these issues are not properly before this Court. Rule 23(1)(c) indicates that the Court will consider only questions set forth in the petition or fairly comprised therein; it is thus entirely irrelevant to brief and to discuss other questions. Rule 42(3) is consistent with Rule 23(1)(c); the facts or questions of law to be discussed in the motion for leave to file a brief *amicus curiae* are those which are fairly comprised in the petition.

Following a non-jury trial in the United States District Court for the Western District of Oklahoma, petitioners were convicted of unlawfully entering a military base, in violation of 18 U.S.C. 1382. Four of the twelve petitioners were given suspended sentences and placed on probation for one year; six were sentenced to imprisonment for terms of four months; two were sentenced to prisn terms of six months and ordered to pay fines of $250 and $500, respectively. The court of appeals affirmed (Pet. App. 1a-14a).

On May 4, 1972, petitioners and 75 to 200 others gathered at Gate Two of Tinker Air Force Base in Oklahoma City, Oklahoma, to protest the war in Vietnam (Pet. App. 1a). The previous day the Base Commander, pursuant to Air Force Regulation 125-37, which authorized him to prescribe measures restricting entry onto the base, had promulgated Supplement 2 to the Base regulations.[2] This regulation lists the special categories of personnel identification to be recognized at the base gates and provides that visitors may be admitted only under specified procedures, which include the verification of the purpose of the visit by an appropriate person on the base (Pet. App. 3a).

In accordance with controls required for closed bases, a large warning sign was posted at the entrance to the base just north of Gate Two, which was visible to anyone attempting entry (see 50 U.S.C. 797(b)). The sign read:

---

[2] Supplement 2 is reproduced in the petition (pp. 4-7).

WARNING
U.S. AIR FORCE BASE

IT IS UNLAWFUL TO ENTER THIS AREA WITHOUT PERMISSION OF THE COMMANDER TINKER AIR FORCE BASE WHILE ON THIS INSTALLATION ALL PERSONNEL AND THE PROPERTY UNDER THEIR CONTROL ARE SUBJECT TO SEARCH

Petitioners were also warned that Tinker Air Force Base was a controlled entry installation by the presence of five security guards and a fence surrounding the base (Pet. App. 8a-9a).

Despite those warnings, a group of thirty or forty people crossed the "white line" signifying entrance to the base. Two officers, trying to restrain the group, explained the illegality of their entry. They were also met by Lt. Col. Malone, who read them the following statement (Pet. App. 2a):

> The installation commander, Col. John C. Holley, United States Air Force, denies you permission to enter this military installation or to be physically present on its property.
>
> You are trespassing on a military installation of the United States. By order of the installation commander you will immediately remove yourselves from this military installation. If you do not immediately comply, you will be arrested and prosecuted by the federal authorities. You are advised that pursuant to Title 18 U.S.C. 1382 "whoever, within the jurisdiction of the United States, goes upon any military, naval, or coast guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation * * * shall be fined not more than $500 or imprisoned not more than six months, or both."

One of the petitioners then read a statement to Col. Malone. When asked to leave, the group refused, sitting down in the middle of the street. They were thereupon arrested (Pet. App. 2a).

1. Petitioners contend (Pet. 9-12) that they did not have the requisite specific intent to violate 18 U.S.C. 1382, which provides for criminal punishment of "[w]hoever * * * goes upon any military * * * reservation * * * for any purpose prohibited by law or lawful regulation * * *." Both courts below, however, considered this issue and properly concluded that the record clearly established the element of specific intent.[3] While the warning sign near the gate did not reproduce Supplement 2 in its entirety, the sign, together with the fence and security guards, gave petitioners actual notice of the essential import of Supplement 2—that the base was closed and that it would be unlawful for them to enter without the commanding officer's permission. Once the substance of the prohibition was communicated, it was unnecessary to

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[3] Petitioners (Pet. 10-11) and the *amicus* (Br. 3-4) contend that this conclusion is inconsistent with the dictum in *Holdridge* v. *United States*, 282 F. 2d 302, 309 (C.A. 8), which affirmed convictions for violation of the second paragraph of Section 1382, prohibiting re-entry upon a military installation after orders not to return. In distinguishing the first paragraph, involved in this case, the court noted that "motive to some extent at least is an element of the offense there defined. Purpose and the prohibition must both be proved. This interpretation affords some protection to the innocent trespasser." But petitioners were hardly innocent trespassers. The evidence showed that they had ample notice that they were prohibited from entering the base, and that they nevertheless entered, with the obvious purpose of disobeying the prohibition. Contrary to the suggestion in the *amicus* brief (pp. 3-4), the district court at trial clearly recognized the necessity for a finding of specific intent (Tr. 279, 285-286).

quote or cite the regulation. See *Lambert* v. *California*, 355 U.S. 225, 227. As the court of appeals observed (Pet. App. 9a-10a) in an opinion on which we principally rely:

> We agree with the District Court which stated: "It is not significant or prejudicial to the Defendants that the Information describes the regulation as one prohibiting the entry upon the military reservation 'without the consent or permission of the Commanding Officer,' rather than 'without proper identification.' Such language is merely descriptive of the regulations, which speaks for itself. The important fact is that the regulation prohibited entry to certain persons. It becomes a matter of proof as to whether the Defendants were such persons and intended to enter the base knowing that they were so prohibited."

In view of the various circumstances indicating the unlawfulness of their entry (see Pet. App. 11a-12a), proof of specific intent was more than sufficient.

Petitioners also contend that, rather than intending to violate a lawful regulation, their purpose in entering the base was to exercise First Amendment rights. The fact that the main purpose of their entry was to protest the war in Vietnam does not, of course, negate the existence of a specific intent to violate Supplement 2. Moreover, as the trial judge observed (Order Denying Motion to Dismiss Indictment, Pet. App. 27a), petitioners did not brief their First Amendment claim in the district court. Nor was it raised in their brief in the court of appeals. Thus, this Court need not consider it. See *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16; *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147, n. 2. In any event, the commanding officer of a closed base has

very extensive power to exclude persons from entry in the interest of order and security. See *Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO* v. *McElroy*, 367 U.S. 886; *McQueary* v. *Laird*, 449 F. 2d 608 (C.A. 10); *Weissman* v. *United States*, 387 F. 2d 271 (C.A. 10). *Flower* v. *United States*, 407 U.S. 197, on which petitioners rely, involved the peaceful distribution of leaflets by a single person, which took place not on a restricted area of a base but on a street open to the public.[4] There was, in short, no violation of First Amendment rights in this case.

2. Petitioners also claim that, although charged with a petty offense, they were entitled to a jury trial in the district court, since "Congress, however, has not expressly provided otherwise" (Pet. 14-16). This contention is thoroughly answered in the district court's opinion

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[4] Petitioners suggest that the commanding officer could not prohibit their entry except to prevent threatened disruptive conduct (Pet. 13-14). Their reliance on *Kiiskila* v. *Nichols*, 433 F. 2d 745, 751 (C.A. 7), is misplaced. In that case an employee of the base was excluded, without prior warning, because she had demonstrated against the war near, but not on, a naval base and had invited an officer of the base to a rally. The court noted that the military did not even allege the violation of a post regulation. It refused to infer from the employee's conduct off base that she would engage in similar, and "presumably unprotected," activity on base (433 F. 2d at 751). In *United States* v. *Bradley*, 418 F. 2d 688 (C.A. 4), on which petitioners also rely, the court held that distribution of leaflets on a military post by two students was not prohibited by a post regulation applicable only to larger, more obstructive demonstrations. In contrast to the instant case, the defendants in *Bradley* were carrying out their activity on a completely unrestricted portion of the base.

denying the motion for a jury trial (Pet. App. 15a-24a),[5] and we rely on that opinion here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.

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[5] See also the discussion in the court of appeals opinion (Pet. App. 4a-5a).

DOJ-1973-10